

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA DEPARTMENT OF HUMAN RIGHTS

Barbara J. Johnson,

Complainant,

v.

Association of Minnesota Counties,

Respondent.

**FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER**

The above-entitled matter came on for hearing before Administrative Law Judge (ALJ) Phyllis A. Reha on February 24-28, and March 3, 4, and 6, 1997 at the Office of Administrative Hearings, 100 Washington Square, Minneapolis, Minnesota, 55401. The record closed on May 7, 1997, upon receipt of the parties' post-hearing memoranda and proposed findings of fact.

Carole V. Ryden, Esq., Sandra Boehm & Associates, 2310 Firststar Center, St. Paul, Minnesota 55101, appeared on behalf of Barbara Johnson ("Complainant").

Lawrence R. King and Shawn M. Raiter, Esq., King and Hatch, 1500 Landmark Towers, 345 St. Peter Street, St. Paul, Minnesota, 55102, appeared on behalf of Association of Minnesota Counties ("Respondent").

NOTICE

Pursuant to Minn. Stat. § 363.071, subd. 2 and 3, this Order is the final decision in this case and under Minn. Stat. § 363.072, the Commissioner of the Department of Human Rights or any person aggrieved by this decision may seek judicial review pursuant to Minn. Stat. §§ 14.63 to 14.69.

STATEMENT OF ISSUES

1. Whether Complainant met her burden of proof by a preponderance of the evidence that she was discriminated against on the basis of sex (gender) in violation of Minn. Stat. § 363.03, subd. 1(2).

2. Whether Respondent met its burden of production that it had a legitimate non-discriminatory reason which justified laying off Complainant.

3. Whether Complainant has met her burden of proof that Respondent's articulated reason for laying off Complainant was pretextual and that Respondent intentionally discriminated against Complainant on the basis of sex (gender).

4. Whether Complainant met her burden of proof by a preponderance of the evidence that AMC's failure to hire her back in 1996 constituted reprisal discrimination in violation of Minn. Stat. § 363.03, subd. 7.

5. Whether Complainant is entitled to damages or other relief pursuant to Minn. Stat. § 363.071, subd. 2.

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Complainant, Barbara Johnson, is an attorney licensed to practice law in the State of Minnesota. From August 20, 1990 to December 31, 1993, Ms. Johnson worked as a policy analyst and general counsel for the Association of Minnesota Counties ("AMC"). From January 1, 1994 to May 20, 1994, Ms. Johnson's title was policy analyst/legal counsel. Ms. Johnson was at all times an at-will employee. (Johnson T. 61, 595-96; Ex. 101).

2. AMC, is a nonprofit organization of Minnesota counties with its principal place of business located at 125 Charles Avenue, St. Paul, Minnesota, 55103. Its primary purpose is to assist counties in conducting county business by providing legislative analysis and lobbying services to its members. In May of 1994, AMC had 86 county members. Since 1994, all 87 counties in the state of Minnesota have been members of AMC. (Kelleher, T. 284-85; Swedzinski, T. 555; Ex. 126).

3. AMC generates its operating revenues primarily from dues paid by its member counties. In 1994, AMC had an operating budget of approximately \$1,080,000.00 per year, of which approximately \$730,000.00 is generated through member dues and interest revenues from investments it holds. AMC generates the remainder of its income through various sources including consultant and publication revenue, and revenue generated by meetings and conferences sponsored by AMC. (Kelleher, T. 286-87; Mulder T. 1352-54; Exhibit 169).

4. AMC is governed by a five member Executive Committee and a Board of Directors. Members of the Executive Committee are voted on to the committee by AMC delegates and all are county commissioners. The Executive Committee members are not compensated for their time, but are provided a per diem to help recover mileage and meal expenses. (Kelleher T. 283-84, 288-90).

5. Past presidents of AMC's Executive Committee include Frank Swedzinski (1994); Colleen Landkamer (1995); and Kevin Kelleher (1996). (Exhibit 162).

6. The function of the Executive Committee is to serve the needs of the member counties and to oversee the overall operation of the organization in the Board's

absence. (Kelleher, T. 291). The Executive Committee meets frequently on both a scheduled and unscheduled basis. (Kelleher, T. 292-93). Minutes are not always taken during Executive Committee meetings. (Kelleher, T. 247, 295-96; Landkamer, T. 333-34; Swedzinski, T. 578-79; Krueger, T. 649-52).

7. AMC employs an Executive Director who oversees and manages the day-to-day operations of the organization. Mr. James Mulder has held the position of Executive Director of AMC since 1989. (Mulder T. 1317-18).

8. AMC develops its platform and positions it will lobby through internal "policy committees". The purpose of the policy committees is to formulate the bases of AMC's legislative platforms and assist in lobbying the legislature to implement the platforms. (Kelleher, T. 299). Policy analysts employed or retained by AMC are assigned to particular policy committees and lobby AMC's corresponding platforms and positions at the State Capitol.

9. In any given legislative session there are many different issues that counties may find important. (Kelleher, T. 213; Krueger, T. 656-57; Johnson, T. 1029).

10. Prior to 1990, AMC had three policy committees: (1) Physical Development; (2) General Government; and (3) Human Services. (Weirens T. 1224).

11. The General Government policy committee covered issues relating to taxes and finance, elections, labor and personnel issues, economic development, and government structure. (Beckmann, T. 746).

12. The Physical Development policy committee covered issues relating to transportation, agriculture, water quality, environment and planning. (Weirens, T. 1217-18).

13. The Human Services policy committee covered issues relating to welfare and social services. (Weirens, T. 1226).

14. In 1990, the Physical Development policy committee was split into two separate committees: Transportation/Agriculture and Environment/Natural Resources. (Weirens T. 1224).

15. In the summer of 1990, AMC advertised for two staff Policy Analyst positions. One position was in the area of taxation and the other was in the area of environment and natural resources. (Riley, T. 1154-55).

16. AMC hired Complainant on August 20, 1990, to be the Policy Analyst for the Environment and Natural Resources policy committee and General Counsel for AMC. Nick Riley was hired on August 15, 1990, as the Policy Analyst for the taxation position. (Riley, T. 1154-55).

17. Ms. Johnson's area of expertise is environmental issues and specifically solid waste management. (Johnson T. 73, 1020-21).

18. By the Fall of 1990 AMC employed five policy analysts. Each staff policy analyst assigned to a policy committee has primary responsibility for analyzing and lobbying the issues within that committee. However, on occasion issues overlapped into different policy committees and policy analysts were expected to coordinate their

efforts and to assist each other if necessary. (Beckmann, T. 746-48; Weirens, T. 1225-26, 1286; Mulder, T. 1531-32).

19. Among their duties, policy analysts were expected to attend the meetings of their AMC policy committee and to attend the AMC Legislative Steering Committee meetings. Policy analysts were also expected to provide members in attendance at these meetings with updates on the current status of AMC platforms and positions. (Kelleher, T. 299).

20. Patricia Conley, the Chief Policy Analyst, was assigned to the Human Services policy committee. Ms. Conley's salary for the year 1990 was \$47,590. Barbara Johnson was assigned to the Environment and Natural Resources policy committee and her 1990 salary was \$44,000. Nick Riley was assigned to the General Government policy committee and his salary for 1990 was \$38,000. Merry Beckmann was also assigned to the General Government policy committee and her 1990 salary was \$36,774. Dave Weirens was assigned to the Transportation and Agriculture policy committee and his 1990 salary was \$30,139.

21. From August of 1990 to November of 1993, Ms. Johnson's work as General Counsel for AMC was minimal to nonexistent. At the time of her 1992 performance review, Ms. Johnson agreed that her job description and title should be changed to Policy Analyst/Legal Counsel. Following this change in title, Ms. Johnson continued to do very little legal work for AMC. (Johnson T. 592, 596-97).

22. During her employment at AMC, Ms. Johnson worked almost exclusively on issues concerning solid waste and solid waste flow control. However, Ms. Johnson did at times work on issues related to forestry, petrofund reimbursement and water quality. (Johnson T. 79-116).

23. From 1990 to 1994, Ms. Johnson successfully lobbied AMC platform positions regarding solid waste management issues. Ms. Johnson also wrote articles on a regular basis which ran in AMC's biweekly newsletter called "AMC Update". These articles kept county commissioners updated on the progress of legislation. In recognition of her efforts, Ms. Johnson received letters of commendation and certificates of commendation from Governors Perpich and Carlson. (Johnson, T. 74-106; Exhibits 9, 10-1y, 10, 11 and 42.).

24. Ms. Johnson's annual performance evaluations were generally positive and until 1994, she consistently received raises in salary. However, the evaluations did point out deficiencies including Ms. Johnson's perceived lack of flexibility to handle a broader range of issues and her need to become "more interactive with other analysts". (Exs. 1f, 1h, and 101 bates 30-63).

25. Complainant was viewed by her co-workers and county commissioners to be technically skilled in the area of solid waste but lacking in interpersonal skills and in the ability to take on a broader range of issues. (Kelleher, T. 310, 314; Landkamer, T. 335-36, 351; Swedzinski, T. 574, 580; Krueger, T. 661; Weirens, T. 1244, 1298-99; Ex. 101, bates 34, 36, 51).

26. Compared to the performance evaluations of other Policy Analysts, Ms. Johnson was generally evaluated below other staff members both male and female. (Ex. 101, 163, 164, 165, 166).

27. During the time that Complainant was employed at AMC, Chief Policy Analyst Patricia Conley and Staff Policy Analyst Merry Beckmann were sent to national conferences on a more frequent basis than the other policy analysts at AMC. (Kelleher, T. 395-96; Beckmann, T. 739-41).

28. During her employment at AMC, Ms. Johnson's requests to attend national conferences were denied by Mr. Mulder. (Johnson, T. 719-21).

29. During his employment with AMC, Mr. Riley attended three national conferences. On four occasions, Mr. Mulder denied Mr. Riley's requests to attend national conferences. (Riley, T. 1170-71).

30. During his employment with AMC, Mr. Weirens attended one national conference. However, Mr. Weirens was allowed to annually attend a transportation conference in Washington D.C. (Weirens, T. 1244-45).

31. No evidence was presented that gender was a factor Mr. Mulder considered when determining which staff policy analyst should attend an out-of-town conference.

32. On at least four occasions during her employment with AMC, Ms. Johnson witnessed Mr. Mulder lose his temper, raise his voice and become visibly red in the face. However, most of the incidents to which Ms. Johnson testified involved situations where Mr. Mulder lost his temper at both male and female employees. (Johnson, T. 699-704). It is Ms. Johnson's opinion that while Mr. Mulder "yelled at just about everyone" he yelled at her more frequently. (Johnson, T. 704).

33. Mary Fran Riley, who was the public information officer for AMC from 1990 to 1995, testified that she witnessed or heard Mr. Mulder lose his temper and raise his voice on more than one occasion. Ms. Riley further stated that Mr. Mulder lost his temper and directed his yelling "to most people in the office .. at one time or another." (Riley, T. 162). Dave Weirens testified that he saw Mr. Mulder lose his temper on one occasion when Weirens asked for an extension of a deadline for bill summaries. (Weirens, T. 1247). Other policy analysts could not remember seeing Mr. Mulder lose his temper. (Beckmann T. 753, 774; Mastro T. 860; Riley, T. 1202; Weirens 1247-50).

34. In 1992, while having dinner with AMC policy analysts Johnson, Weirens, Conley and Beckmann, Mr. Mulder made a statement to the effect that he was "racist and sexist but couldn't help it because he was a product of his upbringing." (Johnson, T. 725; Weirens, T. 1279).

35. Both male and female employees indicated at times that they were not happy with Mr. Mulder's performance as Executive Director. (Krueger, T. 621).

36. Nick Riley is a policy analyst/lobbyist who began his employment at AMC on August 15, 1990. Mr. Riley applied for the environmental position with AMC but was assigned to the General Government policy committee along with Merry Beckmann. Mr. Riley primarily worked on tax and finance issues. (Riley, T. 1155-57).

37. Prior to beginning his employment at AMC, Mr. Riley worked for the State Planning Agency in the Environmental Division and worked on topics such as used oil, hazardous waste, and beautification programs. Mr. Riley also served as one of two lobbyists for Governor Perpich. (Riley, T. 1145-51).

38. During the course of his employment with AMC, Mr. Riley received yearly performance evaluations which were generally positive and complimentary of his work performance. (Riley, T. 1178-79; Exhibit 164).

39. Dave Weirens is a policy analyst/lobbyist who has worked for AMC since September of 1988 and is currently an AMC employee. Prior to his employment at AMC, Mr. Weirens was employed as a physical resource planner for the Region 5 Development Commission where he performed transportation and planning functions. (Weirens, T. 1212-15).

40. From 1988 to 1990, Mr. Weirens staffed the Physical Development policy committee which included issues relating to transportation, agriculture, environment, natural resources and planning. (Landkamer, T. 355-56; Weirens, T. 1217-18, 1224).

41. After the Physical Development policy committee was split into two committees in 1990, Mr. Weirens was responsible for the newly formed Transportation and Agriculture policy committee. Mr. Weirens continued to handle environmental issues related to water quality, watershed districts, and soil and conservation districts. (Weirens T. 1219, 1224, 1263-68; Mulder, T. 1402).

42. During his employment at AMC, Mr. Weirens received yearly performance evaluations which were generally positive regarding his work performance. (Exhibit 163).

43. 1991 salaries for the policy analysts were as follows: Patricia Conley - \$51,775; Barbara Johnson - \$47,500; Nick Riley - \$40,500; Merry Beckmann - \$40,000; and Dave Weirens - \$32,852.

44. In 1992 the salaries for the policy analysts were as follows: Patricia Conley - \$53,895; Barbara Johnson - \$48,700; Merry Beckmann - \$41,820; Nick Riley - \$41,820; and Dave Weirens - \$36,772.

45. In 1993 the salaries for the policy analysts were as follows: Patricia Conley - \$55,632; Barbara Johnson - \$50,197; Merry Beckmann - \$43,440; Nick Riley - \$43,140; and Dave Weirens - \$39,392.

46. In 1994 the salaries for the policy analysts were as follows: Patricia Conley - \$56,812; Barbara Johnson - \$50,197; Merry Beckmann - \$44,620; Nick Riley - \$44,220; and Dave Weirens - \$40,772.

47. From 1990 to the present, AMC's lobbying efforts have been categorized into four different policy committees. The committees are: (1) General Government; (2) Human Services and Corrections; (3) Transportation and Agriculture; and (4) Environment and Natural Resources.

48. In June or July of every year, the AMC Executive Committee analyzes its upcoming year's budget, and determines what issues it believes will be priorities in the next year's legislative session. The Committee looks at what issues are affecting

counties and which issues will require the most resources. The issues and priorities change from year to year. (Kelleher, T. 314-25; Landkamer, T. 335-36; Swedinski, T. 555; Krueger, T. 644).

49. The Executive Committee continues discussing proposed budget matters into the fall of each year. Based on these discussions, the Executive Director drafts a more detailed proposed budget with consideration given to salary parameters and membership dues. The Executive Director presents the draft of the upcoming year's proposed budget to the Executive Committee for its review and modification. (Mulder, T. 1335, 1344-45, 1448-49).

50. Since 1992, AMC has annually entered into contracts for lobbying services in Washington D.C. and Minnesota.

51. On occasion, AMC makes expenditures that are not in the budget. When this occurs, the budget is modified to reflect the money actually spent. (Mulder, T. 1346-47, 1455-58, 1461, 1568-70).

52. An example of mid-year modification of the budget occurred in 1993 when AMC contracted with Ms. Lois McCarron to provide previously unbudgeted contract lobbying services in the area of health care. Once AMC began paying Ms. McCarron pursuant to her contract, a line item was added to the budget for "health care fiscal analyst". (Mulder, T. 1349-50; Exhibit 171, bates 152).

53. In approximately the summer of 1993, the AMC Executive Committee was concerned that the organization had become too bureaucratic and less flexible than it had been in the past. AMC began to consider ways in which it could become more flexible and responsive to the changing nature of county government. (Mulder, T. 1325).

54. Ms. Johnson was aware as early as June or July of 1993 that the Executive Committee was considering reorganizing and restructuring AMC. However, Ms. Johnson believed that the restructuring would only involve the Board and not personnel. (Johnson, T. 1017; 1085).

55. In the Fall of 1993, the AMC Executive Committee realized that solid waste issues regarding "flow control" were going to be handled at the federal level due to a recent court decision. The Executive Committee determined that while these issues would diminish in importance on a state level, lobbying services on solid waste and flow control issues at the federal level were necessary. (Kelleher, T. 320-22; Krueger, T. 658; Riley, T. 1163-64).

56. In the Fall of 1993, the AMC Executive Committee also determined that tax issues and health care would be areas of high priority for counties in 1994. The Executive Committee anticipated that it would be necessary to commit significant resources for lobbying services in these areas. (Kelleher, T. 322).

57. In September of 1993, Mr. Mulder sent a memorandum to the AMC Board of Directors outlining the changes from the 1993 to the 1994 budgets as proposed by the Executive Committee. The proposed budget for 1994 did not include expenditures for contracts for lobbying services relating to federal flow control and the technical analysis

of tax proposals. Nor did the proposed budget mention a reduction in force. (Mulder, T. 1472; Exhibit 112).

58. The minutes of the AMC Executive Committee's September 10, 1993 meeting at which the proposed 1994 budget was discussed reflect no mention or consideration of a reduction in force. (Ex. 4e bates 148, and Ex. 112).

59. The minutes of the AMC Board of Director's September 24, 1993 meeting at which the proposed 1994 budget was discussed reflect no mention or consideration of a reduction in force. (Exhibit 4e).

60. In November of 1993, outgoing AMC president Warren Larson issued his year-end report which listed several recommendations for AMC including the need to "better focus its lobbying efforts" and to remain "flexible in both the addition of staff as well as the reduction of staff in meeting the changing needs of counties." (Ex. 106).

61. During her employment with AMC, Ms. Johnson was the second highest paid policy analyst. Patricia Conley, the Chief Policy Analyst, was paid more than Ms. Johnson. As Chief Policy Analyst, Ms. Conley had additional supervisory responsibilities. (Kelleher, T. 255; Landkamer, T. 346).

62. In December of 1993, the AMC Executive Committee decided to cap Ms. Johnson's salary and not give her an increase in pay for the year 1994. This decision was based on the fact that Ms. Johnson was not performing general counsel duties as stated in her job description. No other policy analyst's salary was capped. (Kelleher, T. 254-55, 317; Landkamer, T. 365-66).

63. In December of 1993, the AMC Executive Committee also decided, at Mr. Mulder's suggestion, not to allocate a salary increase for Mr. Mulder for the calendar year 1994. Instead the money available for Mr. Mulder's raise was divided among Patricia Conley, Merry Beckmann, Nick Riley, Dave Weirens and other support staff. (Kelleher, T. 317-18; Krueger, T. 653-54; Mulder, T. 1369-70, 1476-77).

64. On December 20, 1993, Mr. Mulder informed Ms. Johnson that for the 1994 calendar year her salary was capped at its 1993 level because she was not performing general counsel functions. (Mulder, T. 1474; Exhibit 1i).

65. On December 21, 1993, Ms. Johnson sent a memo to Mr. Mulder requesting that he reconsider the decision to cap her salary for 1994. On that same day, Mr. Mulder informed Ms. Johnson that he saw no reason to change the decision. (Exhibits 72, 101 bates 14, 15).

66. Minutes of the January 21, 1994 meeting of the AMC Board of Directors indicate that AMC's finances were "in the black" for the year 1993. (Exhibit 171, bates 174).

67. During the January 21, 1994 meeting of the AMC Board of Directors, the Board voted to authorize two unbudgeted expenditures. The first unbudgeted expenditure related to the retention of a lobbyist in Washington D.C. to monitor issues relating to solid waste flow control. The second unbudgeted expenditure was the retention of a policy analyst to perform technical analysis of tax proposals. (Landkamer, T. 357; Mulder, T. 1370-73; Exhibit 171 bates 175, 177).

68. In 1994, AMC contracted with the Washington D.C. law firm of Schatz, Paquin for lobbying services related to the solid waste flow control issue. In total, AMC spent \$30,000 in 1994 for Schatz Paquin's services. (Mulder, T. 1381-83).

69. During the calendar year 1994, AMC entered into contract obligations with Mr. Don Diddams for tax analysis services totaling \$28,000 in unbudgeted expenditures. Mr. Diddams is considered an expert in the technical analysis of taxation policies. Prior to joining AMC, Mr. Diddams worked for the City of Minneapolis, several law firms, and the League of Minnesota Cities performing tax analysis and creating models to study the implications of tax legislation. (Diddams, T. 1102-11; Mulder, T. 1378).

70. While Mr. Diddams provided the tax policy analysis for AMC, Mr. Riley continued to provide some communication and lobbying services to county commissioners and legislators on tax issues. (Diddams, T. 1120-21; Riley, T. 1167-69, 1196-97).

71. On February 24, 1994, AMC adopted a document entitled "A Framework for AMC". The document examined the current structure of AMC to determine how the organization could better serve its members. The primary author of the Framework document was Mr. Mulder who drafted the document at the direction of the Executive Committee. Attached to the Framework document is an addendum listing AMC's needs for "the '90's and beyond". The list was compiled as part of a report by the 1991 Select Committee on the future of AMC. One of the needs listed is the "need to provide increased staff to provide increased services to meet increased organizational needs." (Kelleher, T. 268; Mulder, T. 1327-30, 1440-43; Exhibit 28).

72. In March or April of 1994, the AMC Executive Committee directed Mr. Mulder to prepare reorganization options available to AMC. (Landkamer, T. 367-68; Kelleher, T. 389-91, 467; Mulder, T. 1399, 1486).

73. There is no mention of layoffs or reduction of force in any of the minutes of the meetings of the Executive Committee, Board of Directors, or Legislative Steering Committee. In particular, the minutes of the Executive Committee meeting on April 13 and 14, 1994, contain no mention of a reduction in force or any need to lay off a policy analyst. (Exhibits 3c, 76-82, and 162).

74. Minutes from AMC's May 6, 1994 Board of Director's meeting indicate that AMC was "in good financial status". (Exhibit 4i, bates 189).

75. At the Board of Director's meeting on May 6, 1994, Mr. Mulder provided Board members with a document entitled "Re-Organization Options for AMC". (Kelleher, T. 392; Exhibit 114). Elimination of a policy analyst position was considered as a reorganization or restructuring option. At this meeting, the decision was made to lay off Ms. Johnson. Ms. Johnson's position was selected for elimination because it was believed that solid waste issues would be less of a priority in the near future given the transfer of flow control issues to the federal government and because Ms. Johnson was viewed as less versatile than the other staff policy analysts in the subject areas she was qualified to cover. (Kelleher, T. 257-59; Landkamer 335-36, 353-54; Mulder, T. 1397-98).

76. Following the Board of Director's meeting, AMC President Frank Swedzinski directed Mr. Mulder to advise Ms. Johnson of the elimination of her position. (Mulder, T. 1401).

77. On May 10, 1994, Mr. Mulder informed Ms. Johnson that her position at AMC had been eliminated. In a memo to Ms. Johnson dated May 18, 1994, Mr. Mulder explained that the reason for her lay-off is the need for AMC "to refocus its limited fiscal resources to other needs". (Exhibits 1m, 101 bates 13, 27; Mulder, T. 1401).

78. When Ms. Johnson's position was eliminated, Mr. Mulder assigned Mr. Riley to handle all the solid waste and other environmental issues previously handled by Ms. Johnson. By his own estimation, Mr. Riley spent approximately 20 percent of his time on tax and finance issues after May of 1994. (Kelleher, T. 236-37; Riley, T. 1160-62, 1196-97, 1203-05; Ex. 1).

79. Minutes from the September 23, 1994 meeting of the Board of Directors indicate that AMC's financial picture "is better than the same time last year". (Ex. 162, bates 208; Mulder, T. 1522).

80. Minutes from the December 3, 1994 meeting of the Board of Directors reflect the Board's approval of a nine percent salary increase for Mr. Mulder for the calendar year 1995. (Exhibit 103; Exhibit 162, bates 218).

81. In the 1995 and 1996 calendar years, AMC paid Mr. Diddams an annual salary of \$60,000 for his technical analysis of tax proposals. (Diddams, T. 1130-31).

82. On April 12, 1995, Ms. Johnson filed a charge of gender discrimination with the Department of Human Rights. (Exhibit 1).

83. In January of 1996, Nick Riley resigned from AMC to take a lobbyist position with Ramsey County. Ms. Johnson learned of Mr. Riley's resignation and sent a letter to Mr. Mulder and the AMC Executive Committee stating that she would like to return to work at AMC and that she would be willing to work at Mr. Riley's rate of pay. (Riley, T. 1177; Exhibit 5).

84. On February 2, 1996, Mr. Mulder sent a letter to Ms. Johnson informing her that the Board of Directors decided to hire a contract lobbyist to fill the position left by Nick Riley. (Exhibit 6).

85. For the remainder of the 1996 legislative session, Mr. Riley's duties were temporarily filled with the services of contract lobbyist John Boland. (Kelleher, T. 375; Weirens, T. 1253; Mulder, T. 1404, 1512).

86. On February 14, 1996, Ms. Johnson requested a 180-Day Hearing pursuant to Minn. Stat. § 363.071, Subd. 1a.

87. In the Spring of 1996, Mr. Weirens informed Mr. Mulder that he was interested in being assigned to the Environment and Natural Resources policy committee. Mr. Weirens has prior work experience in environmental policy analysis. From 1988 to 1990, Mr. Weirens was the AMC policy analyst responsible for environmental issues. After Ms. Johnson was hired, Mr. Weirens continued to work on water quality issues as part of the Transportation/Agriculture policy committee. (Landkamer, T. 348; Kelleher, T. 462-63; Weirens, T. 1254-55; Mulder, T. 1555).

88. Following the 1996 legislative session, AMC decided to hire a staff policy analyst to replace Mr. Riley. (Kelleher, T. 376; Mulder, T. 1405-07).

89. The AMC Executive Committee decided to submit a general advertisement for the staff policy analyst position in order to solicit resumes from a wide field of applicants. The advertisement sought candidates with experience in areas including agriculture, transportation, tax, policy, social services, and environmental issues. (Landkamer, T. 348; Kelleher, T. 377-78; Mulder, T. 1407).

90. AMC received approximately 200 applications in response to the advertisement for the staff policy analyst position. (Kelleher, T. 379; Mulder, T. 1407).

91. In a letter dated May 13, 1996, Ms. Johnson submitted her resume for consideration for the policy analyst position. (Johnson, T. 950; Exhibit 7).

92. In May or June of 1996, Ms. Johnson attended a social gathering at which AMC Executive Committee President Kevin Kelleher was also present. Ms. Johnson asked Commissioner Kelleher about her application and the interview process for the policy analyst position. Commissioner Kelleher indicated that, given Ms. Johnson's lawsuit, he could not discuss the situation. (Kelleher, T. 272; Johnson, T. 1012-13).

93. Mr. Mulder initially screened the 200 resumes received to remove any applicant who did not meet the minimum requirements in terms of education or experience. At that time, 30 resumes were removed. Ms. Johnson was among the approximately 170 applicants who remained under consideration for the position. (Mulder, T. 1407-08).

94. Policy analysts Merry Beckmann, Dave Weirens, Patricia Conley, and Executive Director James Mulder reviewed the remaining 170 resumes. (Beckmann, T. 757-59, 763-64; Weirens, T. 1255-59). As a result of that review, the number of resumes was reduced to approximately 140. Ms. Johnson was among the approximately 140 applicants who remained under consideration for the position. (Beckmann, T. 764-65; Mulder, T. 1409).

95. Executive Committee President Kevin Kelleher also reviewed the approximately 140 resumes remaining for consideration. (Kelleher, T. 379).

96. Ms. Beckmann, Ms. Conley, Mr. Weirens, AMC Associate Director Michael Rhyner, and contract employee Raeone Loscalzo individually reviewed the remaining resumes and each compiled a list of the eight to ten applicants they considered to be the best qualified. (Beckmann, T. 765-66; Weirens, T. 1256-57; Mulder, T. 1410).

97. Ms. Beckmann did not include Ms. Johnson on her final short list of candidates because Ms. Beckmann believed that Ms. Johnson did not fit in well with the other policy analysts at AMC. (Beckmann, T. 767).

98. Mr. Weirens did not include Ms. Johnson on his final short list of candidates because he did not believe that Ms. Johnson was a "team player". Mr. Weirens also believed that Ms. Johnson did not display enough flexibility or initiative during her employment with AMC. (Weirens, T. 1257).

99. Ms. Johnson was not included on the short list of candidates of either Ms. Conley, Mr. Rhyner, or Ms. Loscalzo. (Beckmann, T. 767-68; Mulder, T. 1412).

100. Ms. Beckmann, Ms. Conley, Mr. Weirens, Mr. Rhyner, and Ms. Loscalzo reviewed their lists of top applicants and decided to offer interviews to ten candidates. (Beckmann, T. 768-69).

101. The candidates ultimately interviewed for the position had backgrounds in various areas of lobbying including transportation and the environment. (Beckmann, T. 769; Weirens, T. 1260; Mulder, T. 1411).

102. After the interviews were conducted, the leading candidate was a lawyer with Minnesota Senate counsel experience and a background in wetlands. This candidate was subsequently removed from consideration because his salary requirement was too high for the AMC budget. (Beckmann, T. 770-71; Weirens, T. 1261; Mulder, T. 1415).

103. The person ultimately hired by AMC for the staff policy analyst position was Ms. Carol Lovro. Ms. Lovro's background includes transportation lobbying on behalf of a federal highway federation group. Ms. Lovro was assigned to the Agriculture and Transportation policy committee. (Kelleher, T. 381-82; Weirens, T. 1261-62).

104. With the hiring of Ms. Lovro, Mr. Mulder granted Mr. Weirens' request to leave the Transportation and Agriculture policy committee and staff the Environment and Natural Resources policy committee. (Beckmann, T. 772-73; Weirens, T. 1263; Mulder, T. 1416).

105. Since losing her position at AMC, Ms. Johnson has been unable to find comparable employment.

106. A contested case hearing was held on this matter on February 24-28, and March 3, 4, and 6, 1997. The record closed on May 7, 1997.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS OF LAW

1. The Administrative Law Judge has the authority to consider the issues raised by Complainant's discrimination charges under Minn. Stat. §§ 363.071, subds. 1 and 2, and 14.50.

2. Proper notice of the hearing was timely given and all relevant substantive and procedural requirements of statutes and rules have been fulfilled.

3. The Respondent is an "employer" as defined in Minn. Stat. § 363.01, subd. 17. Complainant is an "employee" as defined in Minn. Stat. § 363.01, subd. 16.

4. Pursuant to Minn. Stat. § 363.03, subd. 1(2)(c), it is an unlawful employment practice for an employer to discriminate against a person because of sex with respect to the terms, conditions or privileges of employment.

5. Complainant is a woman. Therefore she belongs to a protected class under the Minnesota Human Rights Act.

6. The three-step analysis established in McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973) applies to sex discrimination under the Minnesota Human Rights Act. Hubbard v. United Press Int'l, Inc., 330 N.W.2d 428 (Minn. 1983). Using this analysis, the Complainant has the burden to establish a prima facie case of discrimination. If the Complainant establishes a prima facie case, a presumption is created that the employer unlawfully discriminated against her and the burden shifts to the Respondent to articulate some legitimate, nondiscriminatory reason for its actions. If the Respondent meets this burden, the Complainant must show by a preponderance of the evidence that the Respondent's reasons for its actions were merely a pretext for discrimination. Sigurdson v. Isanti County, 386 N.W.2d 715, 720 (Minn. 1986).

7. The ultimate burden of persuading the trier of fact that the Respondent engaged in intentional discrimination remains at all times with the Complainant. St. Mary's Honor Center v. Hicks, 509 U.S. 502, 113 S.Ct. 2742 (1993); Hasnudeen v. Onan Corporation, 552 N.W.2d 555, 557 (Minn. 1996).

8. In order to establish a prima facie case of discrimination, the Complainant must show that: (1) she is a member of a protected class; (2) she sought and was qualified for opportunities her employer made available to others; (3) despite her qualifications, she was denied opportunities or was subjected to other adverse employment actions; and (4) after denial, the opportunities remained available or were given to other persons with her qualifications but not of her protected class. See, Sigurdson v. Isanti County, 386 N.W.2d 715, 720 (Minn. 1986).

9. Complainant has presented a prima facie case of sex discrimination.

10. Respondent has articulated legitimate nondiscriminatory reasons for its employment actions.

11. Complainant has failed to show, by a preponderance of the evidence, that Respondent's reasons for its actions are a pretext for sex discrimination.

12. Pursuant to Minn. Stat. § 363.03, subd. 7, it is an unfair discriminatory practice for an employer to intentionally engage in a reprisal against a person because the person opposed a practice forbidden under the Human Rights Act or filed a charge, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under the Human Rights Act.

13. The Complainant has the burden of proof to establish by a preponderance of the evidence that Respondent committed an unfair discriminatory practice in violation of Minn. Stat. § 363.03, subd. 7. Greiner v. City of Champlin, 816 F.Supp. 528 (Minn. 1983).

14. In order to establish a prima facie case for reprisal discrimination, Complainant must show that (1) she engaged in statutorily protected conduct; (2) Respondent took adverse action; and (3) a causal connection exists between the conduct and the action. William v. Metropolitan Waste Control Comm'n, 781 F.Supp. 1424, 1428 (D. Minn. 1992). If the Complainant establishes a prima facie case, a presumption is created that the employer unlawfully discriminated against the charging party and the burden shifts to the Respondent to produce evidence of some legitimate, non-discriminatory reason for its actions. Sigurdson v. Isanti County, 386 N.W.2d 715,

720 (Minn. 1986). If the Respondent meets this burden, the Complainant must show by a preponderance of the evidence that the Respondent's reasons for its actions were merely a pretext for discrimination. McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973).

15. Complainant has failed to show, by a preponderance of the evidence that Respondent engaged in unlawful retaliation when it refused to hire her back as a policy analyst in 1996.

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ORDER

IT IS HEREBY ORDERED:

1. That judgment be entered in favor of Respondent.
2. That Ms. Barbara Johnson's complaint be dismissed in its entirety and with prejudice.

Dated this ____ day of June, 1997.

PHYLLIS A. REHA
Administrative Law Judge

Reported: Transcribed (1588 pages).

MEMORANDUM

Complainant Barbara Johnson brought this action against her employer, Association of Minnesota Counties (AMC), alleging she was subjected to gender discrimination and reprisal discrimination in violation of the Minnesota Human Rights Act, Minn. Stat. § 363.03, subds. 1(2) and 7. Ms. Johnson is an attorney licensed to practice law in the State of Minnesota. She received her Juris Doctorate in 1979. On August 20, 1990, Complainant began working for AMC as a Policy Analyst/General Counsel. Ms. Johnson was assigned to the Environment/Natural Resources policy committee where she lobbied AMC's positions to the legislature on behalf of its member counties. Ms. Johnson worked primarily on issues concerning solid waste. By her own admission, Ms. Johnson's General Counsel duties were minimal to non-existent. (Johnson, T. 592). The other Policy Analysts who worked with Ms. Johnson at AMC were: Mr. Nick Riley, Ms. Patricia Conley, Ms. Merry Beckmann, and Mr. Dave Weirens. For all times relevant to this lawsuit, the Executive Director of AMC was Mr. James Mulder.

Throughout her employment at AMC, Ms. Johnson was the second highest paid Policy Analyst. Ms. Patricia Conley, the Chief Policy Analyst, was paid slightly more than Ms. Johnson due to her additional supervisory duties. Ms. Johnson's annual performance evaluations were generally positive. However, the evaluations did note deficiencies including Ms. Johnson's perceived lack of flexibility in handling a broader range of issues and lack of interaction with the other policy analysts. Until 1994, Ms.

Johnson consistently received raises in salary. In December of 1993, Mr. Mulder informed Ms. Johnson that she would not get a raise in salary for the upcoming calendar year 1994. Mr. Mulder told Ms. Johnson that the decision to cap her salary was based on her non-performance of the General Counsel duties listed in her job description. No other policy analyst's salary was capped. On May 10, 1994, Mr. Mulder notified Ms. Johnson that her position at AMC had been eliminated due to budgetary constraints and a reorganization of AMC. After Ms. Johnson left AMC, her duties were assigned to Mr. Nick Riley.

In January of 1996, Mr. Riley left AMC and began working as a lobbyist for Ramsey County. Ms. Johnson learned of Mr. Riley's resignation and sent a letter to Mr. Mulder and the AMC Executive Committee stating that she would like to return to work at AMC and that she would be willing to work at Mr. Riley's rate of pay. Mr. Mulder informed Ms. Johnson that AMC had hired a contract lobbyist to fill Mr. Riley's position during the legislative session. However, in April or May of 1996, AMC did run a general advertisement for a staff policy analyst position. Ms. Johnson applied for the position but she failed to make the cut of applicants chosen for interviews. Eventually, AMC hired a Ms. Carol Lovro whose background includes lobbying experience in the area of transportation. Ms. Lovro was assigned to the Transportation and Agriculture policy committee and Dave Weirens took over the Environment and Natural Resources policy committee.

Ms. Johnson argues that AMC's decision to cap her salary and to subsequently lay her off constituted gender discrimination. In addition, Ms. Johnson maintains that AMC's refusal to rehire her when Mr. Riley resigned, constituted reprisal discrimination based on her April 12, 1995 filing of a sex discrimination charge with the Minnesota Department of Human Rights.

Respondent maintains that AMC did not discriminate against Complainant when it capped her salary and subsequently eliminated her position. According to AMC, both decisions were solely based on its business judgment. Respondent asserts that the elimination of Complainant's position was part of a restructuring of AMC and a genuine reduction in force necessitated by AMC's significant unbudgeted expenditures and limited income potential. Respondent further maintains that because this case involves a reduction in force, Complainant is required to make an "additional showing" in order to establish a prima facie case of discrimination. See, Dietrich v. Canadian Pacific Ltd., 536 N.W.2d 319, 324 (Minn. 1995); *citing*, Holley v. Sanyo Mfg., 771 F.2d 1161, 1165-66 (8th Cir. 1985). Finally, Respondent argues that Complainant has presented no evidence to support her reprisal claim. Respondent contends that Complainant was not hired back in 1996 because AMC staff who reviewed the applications, the majority of whom were Complainant's former co-workers, did not feel Complainant was a top candidate.

Gender Discrimination

The Minnesota Human Rights Act prohibits employers from discriminating with respect to terms or conditions of employment on the basis of race or gender. Minn. Stat. § 363.03, subd. 1(2)(c). For indirect discrimination claims, Minnesota has adopted the three-part test articulated in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93

S.Ct. 1817 (1973). Under this test, once the Complainant establishes a prima facie case, a presumption is created that the employer unlawfully discriminated against her and the burden shifts to the Respondent to articulate some legitimate, nondiscriminatory reason for its actions. If the Respondent meets this burden, the Complainant must show by a preponderance of the evidence that the Respondent's reasons for its actions were merely a pretext for discrimination. See, Sigurdson v. Isanti County, 386 N.W.2d 715, 719-21 (Minn. 1986). The ultimate burden of persuading the trier of fact that the Respondent engaged in intentional discrimination remains at all times with the Complainant. St. Mary's Honor Center v. Hicks, 509 U.S. 502, 113 S.Ct. 2742 (1993); Hasnudeen v. Onan Corporation, 552 N.W.2d 555, 557 (Minn. 1996).

In order to establish a prima facie case of discrimination, the Complainant must show that: (1) she is a member of a protected class; (2) she sought and was qualified for opportunities her employer made available to others; (3) despite her qualifications, she was denied opportunities or was subjected to other adverse employment actions; and (4) after denial, the opportunities remained available or were given to other persons with her qualifications but not of her protected class. Sigurdson, 386 N.W.2d at 720 (Minn. 1986). The Administrative Law Judge finds that Complainant has established a prima facie case of sex discrimination. Ms. Johnson is a woman and is therefore a member of a protected class. Ms. Johnson demonstrated that she was qualified for the opportunities that AMC made available to others. Despite her qualifications, Ms. Johnson was subjected to adverse employment action in the form of having her salary capped in December of 1993, and being laid off from her employment on May 20, 1994. After her position was eliminated, all of Complainant's duties were assigned to her co-worker Nick Riley, who is not a member of her protected class.

AMC has articulated legitimate and non-discriminatory reasons for capping Complainant's salary and for laying her off. AMC maintains that Complainant's salary was capped because she was not performing the general counsel duties listed in her job description. Throughout her tenure at AMC, Complainant was the second highest paid policy analyst. AMC argues that Complainant's salary at the time of her hiring, was based in part on the expectation that she would take on general counsel responsibilities. By Complainant's own admission, her general counsel duties were minimal to non-existent. (Johnson, T. 592). Given the fact that Complainant was not performing additional duties as general counsel, AMC decided to drop Complainant's general counsel title and cap her salary for 1994.

Likewise, Respondent argues that its subsequent decision to eliminate Complainant's position was based on various business considerations and was arrived at in a legitimate and non-discriminatory manner. Specifically, Respondent has put forth two reasons for laying off Complainant. First, Respondent maintains that a bona fide reduction in force necessitated by financial constraints took place at AMC. AMC contends that the elimination of Complainant's position was necessary due to budget deficits and the need to "free up" money for other expenditures. In addition, Respondent asserts that a general reorganization and restructuring of AMC was under consideration for approximately one year prior to Complainant's lay-off. AMC maintains that Complainant's position was chosen for elimination because her area of expertise, solid waste management, was no longer a top priority due to recent changes in the law

which placed “flow control” issues under federal regulation. Furthermore, Complainant’s area of expertise and her ability to handle other subject matters were viewed as more limited and less flexible than the ability and expertise of the other policy analysts on staff.

Complainant argues that Respondent’s reasons for its adverse employment actions are pretextual. Complainant points to the lack of any documentation evidencing discussions or consideration of staff reductions by the AMC Board of Directors or Executive Committee during 1993 or 1994. In particular, minutes of the September 10, 1993 Executive Committee meeting at which the proposed 1994 AMC budget was discussed, reflect no mention or discussion of the need to cap Complainant’s salary or to lay her off. (Exhibit 4e). Moreover, the proposed reorganization of AMC contained in Mr. Mulder’s February 1994 document, “A Framework for AMC”, specifically lists increasing staff as one of AMC’s needs. (Exhibit 28). In addition, minutes of AMC’s Executive Committee meeting of April 13 and 14, 1994, contain no mention of a reduction in force or the need to lay off a policy analyst. (Exhibit 3c). Complainant also contends that far from reflecting a dire financial outlook or limited resources, minutes from AMC meetings in the Fall of 1993 and 1994 indicate that AMC’s finances were “in the black” and in “good condition”. (Exhibits 171, 4i). In fact, in December of 1994, the Board approved a nine percent salary increase for Executive Director Mulder. (Exhibit 162). Therefore, Complainant maintains that Respondent’s claim that it eliminated her position because of financial constraints and a reduction in force is pretextual.

Under Minnesota law, a reduction in force occurs:

when business considerations cause an employer to eliminate one or more positions within the company. An employee is not eliminated as part of a work force reduction when he or she is replaced after his or her discharge. However, a person is not replaced when another employee is assigned to perform the plaintiff’s duties in addition to other duties, or when the work is redistributed among other existing employees already performing related work. A person is replaced only when another person is hired or reassigned to perform plaintiff’s duties.

Dietrich v. Canadian Pacific Ltd., 536 N.W.2d 319, 324 (Minn. 1995) (quoting Barnes v. GenCorp., Inc., 896 F.2d 1457, 1465 (6th Cir.), *cert. denied*, 498 U.S. 878, 111 S.Ct. 211 (1990)).

In Dietrich, 536 N.W.2d at 322, an employee brought a claim under the Minnesota Human Rights Act alleging age discrimination and reprisal regarding the elimination of her job and other training and hiring opportunities. The employer maintained that the plaintiff’s position was eliminated as part of a company-wide reduction in force. The employer established that it had eliminated 32 clerical positions during a four month period in 1991. Id. at 323. The court determined that the employer’s reorganization scheme resulting in the abolition of plaintiff’s job was “well substantiated as to plan and purpose” and resulted in a bona fide reduction in force. Id. at 327. The court concluded that plaintiff failed to demonstrate that her position was eliminated because of discrimination rather than the well documented reorganization within her department. Id. at 326.

AMC maintains that, like Dietrich, its reorganization plan involved a bona fide reduction in force which resulted in the elimination of Complainant's position. According to Respondent, elimination of Complainant's position was necessary because of AMC's significant unbudgeted expenditures on outside lobbying contracts. In 1994, AMC contracted both with Don Diddams to provide technical tax policy analysis and with the Washington D.C. law firm of Schatz Paquin to provide solid waste lobbying. These contracts resulted in \$58,000 in unbudgeted expenditures for calendar year 1994. Moreover, AMC maintains that no new policy analyst was added to AMC staff after Complainant was laid off. Rather, Respondent argues that Nick Riley and other staff policy analysts assumed Complainant's former duties in addition to their own.

Complainant maintains that AMC's claim that it needed to eliminate her position in order to reduce expenditures is a pretext because her position never was eliminated. Rather, Complainant argues that, with the hiring of tax expert Don Diddams, AMC reassigned Nick Riley to her position. Upon Mr. Riley's resignation in 1996, AMC temporarily hired a contract lobbyist and eventually reassigned Dave Weirens to staff the Environment and Natural Resources policy committee. In support of her argument Complainant cites to Respondent's Answer to her discrimination charge wherein Respondent stated that "all of [Ms. Johnson's] responsibilities" were reassigned to Nick Riley. (Exhibit 1n). Furthermore, Nick Riley himself testified at the hearing that to the best of his knowledge he took over all of Ms. Johnson's duties. (Riley, T. 1205). Complainant contends that it was actually Nick Riley's in-house tax lobbying position that was eliminated when AMC contracted for the services of tax expert Don Diddams. Accordingly, Complainant maintains that a bona fide reduction in force did not occur.

The Administrative Law Judge finds AMC's claim that Complainant's position was eliminated as part of a genuine reduction in force to be unpersuasive. Unlike Dietrich, AMC's reduction in force plan was not "well substantiated". None of the minutes of meetings of AMC's Board of Directors or Executive Committee discuss or mention a reduction in force. In fact, as Complainant points out, the February 1994 "Framework for AMC" document proposed increasing staff. Moreover, none of AMC's internal documents or minutes mention or discuss the need to lay off staff. In fact, reports regarding AMC's financial picture for 1993 and 1994 are generally positive. This assessment is also reflected in the fact that all the staff, except Ms. Johnson and Mr. Mulder, received raises for 1994. Moreover, the Judge finds it significant that in 1994 AMC decided to give Mr. Mulder a nine percent raise in salary for calendar year 1995. Such a substantial raise is further indication of AMC's healthy financial position. Finally, the evidence demonstrated that all of Ms. Johnson's duties were assigned to Mr. Nick Riley and, that for all practical purposes, Mr. Riley replaced Ms. Johnson. Based upon all the evidence received at the hearing, the ALJ determines that AMC did not engage in a bona fide reduction in force. Consequently, Complainant need not make the "additional showing" required by Dietrich and Holley, *supra*.

However, the Judge does find credible AMC's explanation that Complainant's position was eliminated as the result of a general restructuring and reorganization plan that was in progress and under consideration by AMC for several months. The evidence at the hearing established that AMC was contemplating restructuring options since at least June or July of 1993. The testimony further established that Complainant

was viewed as being the most limited of the policy analysts with respect to subject matter expertise. While she was considered to be technically very competent on solid waste issues, Complainant was seen as lacking a broader base of knowledge on environmental and natural resources issues. In addition, Complainant was perceived to be lacking in interpersonal and communication skills. Given these perceived limitations and AMC's belief that solid waste issues would be less of a priority for counties on the state level, AMC argues it decided to layoff Complainant and reassign her duties.

AMC has put forth legitimate and non-discriminatory reasons for its adverse employment action. Therefore, Complainant has the ultimate burden of persuading the Administrative Law Judge by a preponderance of the evidence that Respondent's proffered reasons are pretextual and that the true reason for her adverse salary treatment and her discharge is gender discrimination. Hasnudeen, 552 N.W.2d at 557; *citing*, Hicks, 509 U.S. at 507. This burden of persuasion remains with Complainant even where the Judge has found one of AMC's proffered reasons (reduction in force) to be pretextual. As the U.S. Supreme Court explained in Hicks, "[i]t is not enough, in other words, to disbelieve the employer; the factfinder must believe the plaintiff's explanation of intentional discrimination." Id. at 519.

To support her claim of intentional sex discrimination, Complainant initially argues that it was Mr. Mulder who made the decision to eliminate her position, and not AMC's Board of Directors or Executive Committee. Although, pursuant to its bylaws, the Board of Directors is the decision-making body of AMC (Exhibit 126), Complainant maintains that the Board delegated its authority to hire, fire and discipline staff to its Executive Director James Mulder. (Exhibit 104, p. 9, Sec. XI, subd. 1). Consequently, Complainant contends that Mr. Mulder's remark during a dinner conversation that he was sexist and racist demonstrates that a gender bias motivated his personnel decisions. According to Complainant, evidence of Mr. Mulder's discriminatory animus toward women include his refusal to allow her to attend out of state conferences; his displays of anger; and his decision to cap her salary. Respondent denies that it was Mr. Mulder's decision to cap Ms. Johnson's salary or to eliminate her position. Rather, Respondent insists that both decisions were made by AMC's Executive Committee and Board of Directors. In addition, Respondent argues that Complainant's examples of adverse employment decisions do not in any way evidence a gender bias on the part of either AMC or Mr. Mulder.

The Administrative Law Judge finds that the evidence presented at the hearing established that AMC made the decision to cap Ms. Johnson's salary and to eliminate her position. As Executive Director, Mr. Mulder carried out these decisions at the direction of the AMC's Board of Directors. However, even if the Judge were to accept Complainant's argument and find that it was Mr. Mulder who made the ultimate decision to cap Ms. Johnson's salary and to eliminate her position, the Judge concludes that Complainant has failed to establish that either decision was motivated by a gender-based discriminatory bias. Despite Complainant's assertion that the record contains "overwhelming evidence of gender discrimination", the Judge finds the evidence of sex discrimination to be lacking. First, Complainant maintains that Mr. Mulder's refusal to allow her to attend out-of-state conferences indicated a gender bias. However, the testimony at the hearing established that although Mr. Mulder refused Complainant's

requests to attend conferences, Mr. Mulder allowed Patricia Conley and Merry Beckmann to attend several. Moreover, testimony from Mr. Riley demonstrated that Mr. Mulder refused his requests to attend conferences on four occasions. Based on this evidence, the Judge finds that Complainant has failed to establish that Mr. Mulder's refusal to allow her to attend out-of-state conferences reflected a gender bias.

In addition, Complainant argues that Mr. Mulder lost his temper and yelled at her more frequently than he did at the male policy analysts. Yet, contrary to this claim, the testimony at the hearing established that Mr. Mulder lost his temper and yelled at just about everyone in the office at one time or another. Complainant's own witness, Mary Fran Riley, testified to this effect. (Riley, T. 162). Moreover, Ms. Johnson herself testified that Mr. Mulder "yelled at just about everybody". (Johnson, T. 704). While Ms. Johnson's may have perceived that she was being singled out, the evidence presented at the hearing failed to establish that Mr. Mulder's angry outbursts were motivated by or reflective of a discriminatory animus toward women.

Complainant also maintains that the decision to cap her salary reflects a gender bias because male policy analysts did not have their salaries capped. During her employment at AMC, Ms. Johnson was the second highest paid policy analyst. Ms. Patricia Conley, the Chief Policy Analyst, was paid slightly more because of her additional supervisory duties. The evidence presented at the hearing established that Ms. Johnson was initially hired with the understanding that she would perform general counsel duties for AMC. This understanding was reflected in her starting salary which was \$6,000 more annually than that of Nick Riley who started five days before her. From 1990-1993, Ms. Johnson's General Counsel duties were practically non-existent. (Johnson, T. 592). Based on this, AMC made the decision to remove Complainant's general counsel title and to cap her salary for 1994. While it is true that no other policy analyst had his or her salary capped in 1994, no other policy analyst's title and job duties were likewise reduced.

Furthermore, even with the capping of her salary, Ms. Johnson remained the second highest paid policy analyst after Patricia Conley. In fact, the evidence at the hearing demonstrated that AMC has a solid record of employing women as policy analysts and compensating them well for their work. At all times relevant to this lawsuit, AMC employed more women policy analysts than men and paid the women policy analysts more than their male colleagues. Accordingly, the Judge finds that Complainant has failed to establish that the capping of her salary evidenced a discriminatory bias against women on the part of either AMC or Mr. Mulder. Finally, the fact that AMC replaced Ms. Johnson with Mr. Riley does not evidence gender discrimination where testimony established that Mr. Riley was a qualified, competent and well-liked policy analyst with prior environmental lobbying experience. Complainant has failed to establish that gender-specific factors were used in AMC's decision to let her go and to retain Mr. Riley.

After reviewing all of the evidence, the ALJ finds that Complainant has failed to establish that AMC or Mr. Mulder capped her salary and subsequently laid her off due to gender discrimination. There is no evidence that Complainant's position was eliminated because of her gender, rather than as a result of her perceived limitations including a

lack of flexibility on the issues and an inability to get along well with the other policy analysts. Complainant was at all times an at-will employee. AMC made a personnel decision to lay her off and to reassign her duties. While the Judge finds that this decision was not based on a genuine reduction in force, there is a lack of evidence to suggest that the decision was motivated or tainted by gender discrimination. Rather, the evidence supports AMC's position that it undertook a general reorganization and restructuring of its staff and chose to lay off Complainant because of her limited skills. Accordingly, because the Judge finds that there has been no showing of intentional discrimination, AMC is entitled to judgment on Complainant's gender discrimination claim.

Reprisal Discrimination

The Minnesota Human Rights Act prohibits employers from intentionally engaging in acts of reprisal against any person because that person opposed a practice forbidden under the Act or filed a charge, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under the Act. Minn. Stat. § 363.03, subd. 7. Reprisal includes: "any form of intimidation, retaliation, or harassment. It is a reprisal for an employer to ... refuse to hire ... [to] depart from any customary employment practice; transfer or assign the individual to a lesser position in terms of wages, hours, job classification, job security, or other employment status." Minn. Stat. § 363.03, subd. 7.

Initially, Complainant argues that she has put forth direct evidence of reprisal discrimination. Complainant maintains that in May or June of 1996, Commissioner Kelleher told her during a conversation at a social gathering that it would be difficult for AMC to hire her back given her pending lawsuit. This statement, according to Complainant, is direct evidence that AMC engaged in adverse employment action in response to her having filed a discrimination charge with the Department of Human Rights. In response, AMC denies that Mr. Kelleher ever stated to Complainant that it would be difficult to hire her back because of her lawsuit. Rather, consistent with Mr. Kelleher's testimony at the hearing, Respondent maintains that Mr. Kelleher simply told Complainant that he could not talk about the policy analyst position and application process with her because of her lawsuit.

While the Judge found both Complainant and Mr. Kelleher to be credible witnesses throughout the hearing, the Judge believes that Mr. Kelleher testified truthfully when he recalled only telling Ms. Johnson that he could not talk about her application because of her pending lawsuit. The Judge concludes that Complainant misinterpreted Mr. Kelleher's statement and that Complainant is mistaken in her belief that Mr. Kelleher told her it would be difficult to hire her back because of her lawsuit. Therefore, the Judge rejects Complainant's argument that she has presented direct evidence of reprisal discrimination.

When direct evidence is lacking, Complainant may establish a prima facie case for reprisal discrimination by showing that: (1) she engaged in statutorily protected conduct; (2) Respondent took adverse action against her; and (3) a causal connection exists between the conduct and the action. William v. Metropolitan Waste Control Comm'n, 781 F.Supp. 1424, 1428 (D. Minn. 1992). The causal connection requirement

may be satisfied "by evidence of circumstances that justify an inference of retaliatory motive, such as a showing that the employer had actual or imputed knowledge of the protected activity and the adverse employment action follows closely in time." Hubbard v. UPI, Inc., 330 N.W.2d 428, 444 (Minn. 1983). Similarly, the causal link between the protected activity and the adverse employment action may be shown by "such temporal proximity between the two as to justify an inference of retaliatory motive." Evans v. Ford Motor Co., 768 F.Supp. 1318, 1326 (D. Minn. 1991).

If the Complainant establishes a prima facie case, a presumption is created that the employer unlawfully discriminated against the charging party and the burden shifts to the Respondent to produce evidence of some legitimate, non-discriminatory reason for its actions. Sigurdson v. Isanti County, 386 N.W.2d 715, 720 (Minn. 1986). If the Respondent meets this burden, the Complainant must show by a preponderance of the evidence that the Respondent's reasons for its actions were merely a pretext for discrimination. McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973). The ultimate burden of persuading the trier of fact that the Respondent engaged in intentional discrimination remains at all times with the Complainant. St. Mary's Honor Center v. Hicks, 509 U.S. 502, 113 S.Ct. 2742 (1993); Hasnudeen v. Onan Corporation, 552 N.W.2d 555, 557 (Minn. 1996).

Complainant has established that she engaged in statutorily protected conduct by filing a charge of discrimination with the Department of Human Rights. Complainant has also established that Respondent took adverse employment action by refusing to hire her back when a policy analyst position became available in 1996. As for the third element of a prima facie case, Complainant maintains that there is a causal link between her filing the discrimination charge on April 12, 1995, and AMC's refusal to hire her back in 1996. Complainant points out that AMC was aware of her filing the discrimination charge and AMC's refusal to rehire her took place within approximately one year of her complaint.

The Administrative Law Judge finds that Complainant has put forth a prima facie case of reprisal discrimination. AMC and Mr. Mulder had actual knowledge that Ms. Johnson filed a charge of sex discrimination with the Department of Human Rights in April of 1995. Mr. Riley left his policy analyst position in January 1996. Ms. Johnson's application to return to AMC was rejected in May or June of 1996. The Judge finds that the proximity in time between Ms. Johnson's protected activity and her employment application rejection is sufficient to justify an inference of a retaliatory motive.

Respondent has articulated legitimate, nondiscriminatory reasons for not hiring Ms. Johnson for the open policy analyst position in May of 1996. According to Respondent, none of the staff policy analysts who reviewed the applications and separately compiled lists of their top eight or ten candidates selected Ms. Johnson as a top candidate. The policy analysts who testified at the hearing stated that the existence of Ms. Johnson's Human Rights complaint had no bearing on who they selected to interview. Specifically, Ms. Beckmann and Mr. Weirens testified that they did not select Complainant as a top candidate based on their prior experience of working with her. According to both Beckmann and Weirens, Ms. Johnson was rejected because she did

not fit in well with the other policy analysts, she was not a “team player”, and she lacked initiative and flexibility on the issues. (Beckmann, T. 767; Weirens, T. 1257).

Moreover, Respondent points out that Mr. Mulder removed himself from the final selection of the top policy analyst candidates. Therefore, Respondent argues that any alleged gender bias on the part of Mr. Mulder could not have influenced the creation of the top candidate list. Respondent points to Hermeling v. Montgomery Ward & Co., 851 F.Supp. 1369, 1378 (D. Minn. 1994), where the court cautioned that statements or stray remarks made by decision makers that are unrelated to the decisional process must be distinguished from statements which demonstrate a discriminatory animus in the decisional process. In the end, Respondent contends that AMC selected a qualified female candidate with a background in transportation lobbying to fill the policy analyst position. This candidate, Carol Lovro, was assigned to the Agriculture/Transportation policy committee and Dave Weirens took over the Environment/Natural Resources policy committee.

Complainant argues that Respondent’s claim that she was not a top candidate for the policy analyst position is a pretext for reprisal discrimination. Complainant contends that she was a competent and successful lobbyist during her tenure at AMC and that she was more than qualified to fill Mr. Riley’s vacated position. Given this, Complainant maintains that reprisal discrimination is the only plausible explanation for AMC’s failure to rehire her. According to Complainant, Mr. Mulder’s admission that he is a sexist and his knowledge of her discrimination charge further support her reprisal claim.

Based on all the evidence presented at the hearing, the Judge determines that Complainant has failed to demonstrate that Respondent’s articulated legitimate reasons for not hiring her back are merely a pretext for reprisal discrimination. The Judge found the testimony of the policy analysts regarding how they developed their lists of top candidates and why they did not choose Ms. Johnson to be credible. Both Ms. Beckmann and Mr. Weirens testified that they did not select Ms. Johnson because she was not a team player and she lacked flexibility on the issues. The Judge concludes that the evidence presented at the hearing established that Ms. Johnson was not chosen to interview for the policy analyst position for reasons independent of her discrimination charge. See, Maness v. Star-Kist Foods, Inc., 7 F.3d 704, 708 (8th Cir. 1993) (if an employer proves that its reason for the adverse action was independent of the employee’s exercise of protected rights, the adverse action will be deemed non-retaliatory.) Furthermore, the Judge finds that Complainant failed to establish that Mr. Mulder injected a discriminatory bias into the 1996 hiring decision where the evidence demonstrated that Mr. Mulder removed himself from the final selection process of the top policy analyst candidates.

Accordingly, the Administrative Law Judge concludes that Complainant failed to establish by a preponderance of the evidence that Respondent engaged in reprisal discrimination when it decided not to hire her back as a policy analyst in May or June of 1996. It is therefore the order of the Judge that judgment be entered in favor of Respondent and that Ms. Johnson’s complaint be dismissed with prejudice.

P.A.R.